

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MATTHEW FERO, SHIRLEY KRENZER, ERIN
O'BRIEN, JAMES J. SMITH, JR., SHARON C.
SMITH, JOHN P. PALMER, BARBARA A.
PALMER, ANTHONY PARLATO, BETH A.
PARLATO individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

EXCELLUS HEALTH PLAN, INC. and LIFETIME
HEALTHCARE, INC. ,

Defendants.

Case No. 6:15-cv-06569

JUDGE MICHAEL A. TELESCA

***EX PARTE* MOTION TO CONSOLIDATE**

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' *EX PARTE* MOTION TO
CONSOLIDATE**

Preliminary Statement

Pursuant to Fed. R. Civ. P. 42(a)(2), Plaintiffs Matthew Fero, Shirley Krenzer, Erin O'Brien, James J. Smith, Jr., Sharon C. Smith, John P. Palmer, Barbara A. Palmer, Anthony Parlato and Beth A. Parlato, individually and on behalf of all others similarly situated ("Plaintiffs"), move for consolidation of the following cases with *Fero, et al. v. Excellus Health Plan, Inc., et al.*, Case No. 6:15-cv-06569, the first filed case among the following related matters:

- *Gilbert v. Excellus Health Plan, Inc.*, Case No. 6:15-cv-06570, filed on September 18, 2015 (*see* Complaint, Dkt. # 1) ("*Gilbert* Action");
- *Preston, et al. v. Excellus Health Plan, Inc.*, Case No. 6:15-cv-06577, filed on September 24, 2015 (*see* Complaint, Dkt. # 1) ("*Preston* Action"); and

- *Martinho, et al. v. Lifetime Healthcare, Inc., et al.*, Case No. 6:15-cv-06584, filed on September 30, 2015 (*see* Complaint, Dkt. # 1) (“*Martinho* Action”).

Plaintiffs’ counsel in the *Martinho* Action all of the above matters consent to consolidation of the cases before this Court. *See* Matarazzo Aff. ¶ 1.

Consolidation is appropriate “when actions involving a common question of law or fact are pending before the Court.” Fed R. Civ. P. 42(a)(2). The subject matter and allegations brought by the Plaintiffs are based on identical issues of law and fact as those in the *Gilbert* Action, *Preston* Action and *Martinho* Action. In addition, consolidation would avoid unnecessary expenditure of judicial resources and eliminate the risk of inconsistent legal rulings.

The Four Cases Present Identical Factual Issues

On August 5, 2015, defendants Excellus Health Plan, Inc. and Lifetime Healthcare, Inc. (“Defendants”) learned that cyberattackers had gained unauthorized access to their Information Technology (“IT”) systems. *See* www.excellusfacts.com and www.lifethcfacts.com (last visited Oct. 2, 2015). Defendants’ “investigation revealed that the initial attack occurred on December 23, 2015” giving the cyberattackers more than one year and seven months of unfettered access to the personally identifiable information (“PII”) of nearly 10.5 million individuals, as well as financial information and medical information for some or all of those individuals. *See id.* Specifically, Defendants’ “investigation determined that attackers may have gained unauthorized access to individuals’ ... name, address, telephone number, date of birth, Social Security number, member identification number, financial account information, claims information and, in some instances, clinical information.” *See id.*

The named plaintiffs and all members of the putative class in all of the above actions have had their PII and medical information compromised in this data breach. In the instant action

as well as the *Martinho* Action, Plaintiffs sued both Excellus Health Plan, Inc. and Lifetime Healthcare, Inc. because it appears that both Defendants likely share a single IT system and in fact share the same high level employees, including the President and CEO, vice presidents, and the same Board of Directors. *See id.* and Defendants' 2014 Annual Report¹.

The Four Cases Present Identical Legal Issues

There is almost no variation among the causes of action in this case and the other cases listed above. These cases arise from Defendants' failure to fulfill their legal duty to maintain and protect the sensitive information of their customers and those customers whose data was stored in their systems. In addition, Defendants have yet to fully and accurately inform those affected of the scope of the compromise or the nature of the risks associated with identity theft. It is not clear how many victims Defendants have thus far notified, but Defendants estimate they will not complete the notification process until November 9, 2015. In short, Plaintiffs here and in all other actions on behalf of themselves and all others similarly situated allege Excellus Health Plan, Inc. and, in the instant case and *Martinho* Action, Lifetime Healthcare, Inc., breached their duty to protect and safeguard their customers' PII, financial information and medical information and failed to take reasonable steps to contain the damage caused when any such information was compromised.

Conclusion

For the foregoing reasons, Plaintiffs move for consolidation of *Gilbert v. Excellus Health Plan, Inc.*, Case No. 6:15-cv-06570, filed on September 18, 2015, *Preston, et al. v. Excellus Health Plan, Inc.*, Case No. 6:15-cv-06577, filed on September 24, 2015 and *Martinho, et al. v.*

¹ Located at www.excellusbcbs.com/wps/wcm/connect/6d33c3a3-1a49-49e7-967c-31c1602c51a7/LTHC-2014AnnualReportFinancials.pdf?MOD=AJPERES&CACHEID=6d33c3a3-1a49-49e7-967c-31c1602c51a7 (last visited Oct. 2, 2015).

Lifetime Healthcare, Inc., et al., Case No. 6:15-cv-06584, filed on September 30, 2015 with *Fero, et al. v. Excellus Health Plan, Inc., et al.*, Case No. 6:15-cv-06569, which was the first filed case.

Respectfully submitted,

/s/ Hadley L. Matarazzo

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CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing was served upon defendants Excellus Health Plan, Inc. and Lifetime Healthcare, Inc. by personal service at the following addresses:

Excellus Health Plan, Inc.
165 Court Street
Rochester, New York 14647

Lifetime Healthcare, Inc.
165 Court Street
Rochester, New York 14647

A copy of the foregoing was also sent by electronic mail and first class mail to the attorney at the law firm of BakerHostetler who has identified himself as counsel for Excellus Health Plan, Inc. at the following addresses:

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